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Curcio Hearing

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

17 Cr. 548 (PAC)

5 JOSHUA ADAM SCHULTE,

6 Defendant.

7 -----x

8 December 18, 2019  
9 3:40 p.m.

10 Before:

11 HON. PAUL A. CROTTY,

12 District Judge

13  
14 APPEARANCES

15 GEOFFREY S. BERMAN

United States Attorney for the  
Southern District of New York

16 BY: DAVID W. DENTON, JR.

17 SIDHARDHA KAMARAJU

MATTHEW J. LAROCHE

18 Assistant United States Attorneys

19 FEDERAL DEFENDERS OF NEW YORK

Attorneys for Defendant

20 BY: SABRINA P. SHROFF

21 BY: EDWARD S. ZAS

22 LAW OFFICES OF JAMES M. BRANDEN

Attorney for Defendant

23 BY: JAMES M. BRANDEN

24 THE LAW OFFICES OF SEAN M MAHER, PLLC

Curcio Counsel for Defendant

25 BY: SEAN M. MAHER

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1 (Case called)

2 THE DEPUTY CLERK: Counsel for the government. Please  
3 state your appearance.

4 MR. DENTON: Good afternoon, your Honor. David  
5 Denton, Matt Laroche, and Sid Kamaraju for the government.

6 MR. KAMARAJU: Good afternoon, your Honor.

7 MR. LAROCHE: Good afternoon.

8 MR. MAHER: Good afternoon, your Honor. Sean Maher,  
9 Curcio counsel for Mr. Schulte.

10 THE COURT: Mr. Maher.

11 MR. ZAS: Good afternoon, your Honor. Edward Zas,  
12 Federal Defenders of New York with Sabrina Shroff.

13 MR. BRANDEN: Jim Branden also present, Judge. Good  
14 to see you.

15 THE COURT: Thank you for coming, Mr. Branden.

16 Before we start, I want to start with you, Mr. Maher.  
17 In your letter of December the 3rd in which you report on your  
18 work on the Curcio order, you conclude with the information  
19 available to Mr. Schulte at this stage of the ongoing  
20 litigation. Mr. Schulte wishes to retain his Sixth Amendment  
21 rights to present a defense and to call witnesses on his behalf  
22 including Mr. Larsen and Ms. Shroff.

23 MR. MAHER: Correct.

24 THE COURT: Is that accurate?

25 MR. MAHER: It is.

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1 THE COURT: Let me ask Mr. Schulte, do you want to  
2 have Mr. Larsen and Ms. Shroff called as witnesses to testify  
3 on your behalf?

4 MR. ZAS: Yes.

5 THE COURT: Please, be seated.

6 Ms. Shroff, I have got letters from you dated August  
7 26th and October the 10th, I believe -- yes, I am correct,  
8 August 26 of 2019 and October 10 of 2019, in which you describe  
9 your conversation with you and Mr. Larsen with Mr. Schulte.

10 Are these accurate descriptions of what you told  
11 Mr. Schulte?

12 MS. SHROFF: Yes, your Honor.

13 THE COURT: Is there anything else?

14 MR. MAHER: May we have just a moment, your Honor?

15 THE COURT: Yes.

16 MR. MAHER: Thank you.

17 (Counsel conferring)

18 MR. ZAS: Your Honor, just to clarify your last  
19 question --

20 THE COURT: Yes.

21 MR. ZAS: -- are you asking Ms. Shroff if there is  
22 anything to add to that piece of testimony? Is that your  
23 question?

24 THE COURT: Is there anything else, in addition to  
25 what is set forth in the letters of August 26th and October --

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1 MR. BRANDEN: 10, Judge.

2 THE COURT: Yes, October the 10th; in which he sets  
3 forth what the conversation that Mr. Larsen and she had with  
4 Mr. Schulte, is there anything in addition to that?

5 MR. ZAS: In terms of content of that testimony there  
6 is not, but I believe there is one additional issue we would  
7 like to apprise your Honor of. Unfortunately it is privileged  
8 so we would prefer not to tell the government at this point  
9 what it is, but we think your Honor should know.

10 THE COURT: Why don't you tell me at the side bar.

11 MR. ZAS: Very good.

12 (Pages 5-16 are SEALED and EX PARTE by order of the  
13 Court)

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1 (In open court)

2 THE COURT: To go back to the letters of August 26 and  
3 October 10th, we have established that the two letters set  
4 forth the advice that was given to Mr. Schulte in the summer of  
5 2019. We have also established that the letters recount all  
6 the advice that was given to Mr. Schulte, there was no other  
7 advice that was tendered at the time.

8 Do I have that correct; Mr. Maher? Ms. Shroff?

9 MR. MAHER: Are you asking me to comment on the  
10 letters that the Federal Defenders filed earlier?

11 THE COURT: Yes.

12 MR. MAHER: That appears to be a fair characterization  
13 for those two specific documents, yes.

14 THE COURT: Ms. Shroff, do you agree? You didn't hold  
15 anything back, did you?

16 MS. SHROFF: I didn't hold anything back, your Honor  
17 but if somebody were to sit and discuss those dates with me,  
18 for example, I have not gone back --

19 THE COURT: Don't worry about the dates. I am  
20 concerned with what you said.

21 MS. SHROFF: I don't think I held anything back.

22 THE COURT: All right.

23 MS. SHROFF: But, memories are refreshed. I don't  
24 think I held anything back.

25 THE COURT: Pursuant to the order of setting up a

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1 Curcio hearing, I want to ask Mr. Schulte some questions. I  
2 prefer he take the questions under oath, Mr. Maher.

3 Any objection?

4 MR. MAHER: Just a moment, Judge?

5 (Defendant and counsel conferring)

6 MR. MAHER: Your Honor, before we start, I would just  
7 like to raise a concern. I don't know the questions that your  
8 Honor is going to pose. The questions that your Honor is going  
9 to pose --

10 THE COURT: Pretty standard Curcio questions. You  
11 won't be surprised.

12 MR. MAHER: I understand, though this has been  
13 anything but a standard Curcio proceeding from what I have  
14 seen.

15 THE COURT: Yes.

16 MR. MAHER: My concern is at this point I don't  
17 believe that Mr. Schulte has waived privilege at any point, and  
18 I want to ensure that he is not at this point waiving  
19 privilege. And so, Mr. Schulte is prepared to answer questions  
20 under oath but we ask for time to be able to hear each  
21 question, obviously, and raise an objection if we feel it is  
22 something that is asking to waive a privilege.

23 THE COURT: All right.

24 MR. MAHER: Thank you.

25 THE COURT: Would you swear in Mr. Schulte, please?

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1 THE DEPUTY CLERK: Please right.

2 (Defendant sworn)

3 THE COURT: Please sit down, Mr. Schulte. Make  
4 yourself comfortable.

5 You are a college graduate, aren't you?

6 THE DEFENDANT: Yes.

7 THE COURT: Are you under the care of physician or  
8 psychiatrist or any mental or emotional condition?

9 THE DEFENDANT: No.

10 MS. SHROFF: Your Honor, I'm sorry. Could I have a  
11 minute?

12 MR. MAHER: Hold on. Sorry, Judge.

13 (Defendant and counsel conferring)

14 MR. MAHER: Judge, may we have a side bar, please,  
15 with your Honor?

16 THE COURT: Come up right here.

17 MR. MAHER: Thank you.

18 (Page 20 is SEALED and EX PARTE by order of the Court)

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1 THE COURT: Let me withdraw the last question and ask,  
2 Mr. Schulte, is there anything interfering with your ability to  
3 understand what is happening here today?

4 You can stay seated.

5 MR. MAHER: Okay. Thank you, your Honor.

6 THE DEFENDANT: Can you repeat the question?

7 THE COURT: Okay. Is there anything interfering with  
8 your ability to understand what is happening here today?

9 THE DEFENDANT: No.

10 THE COURT: And, Ms. Shroff is your counsel?

11 THE DEFENDANT: Yes.

12 THE COURT: How long has she represented you?

13 THE DEFENDANT: For over a year.

14 THE COURT: Are you satisfied with her services so  
15 far?

16 (Defendant and counsel conferring)

17 MR. MAHER: Your Honor, at this point I would ask that  
18 your Honor withdraw that question. I don't think it is  
19 necessary for the purposes of this hearing.

20 THE COURT: Mr. Schulte, can you tell us what your  
21 understanding is of today's hearing?

22 THE DEFENDANT: It's about potential conflict.

23 THE COURT: And the potential conflict is what?

24 THE DEFENDANT: Is a conflict of advice given to  
25 counsel.



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1 THE COURT: I have appointed Mr. Maher to provide you  
2 with independent advice about the issues at this hearing. Have  
3 you had an adequate opportunity to consult with Mr. Maher?

4 THE DEFENDANT: Yes.

5 THE COURT: How many meetings did you have and how  
6 long did those meetings take?

7 MR. MAHER: Your Honor, again I'm going to ask if you  
8 would consider withdrawing that question. I think the  
9 pertinent part is whether he feels he has had adequate time and  
10 he is prepared to go forward.

11 THE COURT: I would like to get the number of meetings  
12 and the length of time.

13 MR. MAHER: My concern is that Mr. Schulte has been  
14 under SAMs in solitary confinement for a number of months now  
15 and his ability to remember dates, lengths of time, might be  
16 inaccurate. He doesn't have notes in front of him so I would  
17 not want this to be a basis for, for instance, a perjury  
18 prosecution because he is unable to recall these types of  
19 details.

20 THE COURT: You have been counsel for two months. How  
21 many meetings could you have had in two months?

22 Mr. Schulte, could you tell me how many meetings you  
23 had and what the approximate length of time is?

24 THE DEFENDANT: I don't recall that exact information.  
25 I know we have met several times at the SCIF and several times

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1 in the prison to discuss these issues ranging minutes to hours.

2 THE COURT: But you believe -- I asked you before, you  
3 believe you have had an adequate opportunity to discuss the  
4 purpose of today's meeting with Mr. Maher?

5 THE DEFENDANT: I do.

6 THE COURT: Yes?

7 THE DEFENDANT: Yes.

8 THE COURT: Now, did Mr. Maher inform you that the  
9 Court -- has informed the Court that you may wish to call two  
10 attorneys, Matthew Larsen and Ms. Sabrina Shroff to testify as  
11 witnesses for you at the trial. I am going to explain to you  
12 certain consequences that would result from your deciding to  
13 call an attorney as a witness.

14 Under most circumstances, the law protects your  
15 communications with your lawyers from being disclosed to anyone  
16 else unless you choose to disclose it. This is what is known  
17 as the attorney-client privilege.

18 You understand this, don't you?

19 THE DEFENDANT: Yes.

20 THE COURT: Do you understand that certain decisions  
21 you make, however, will result in a waiver of that  
22 attorney-client privilege and the government would be entitled  
23 to know about some of your communications with your attorneys?

24 THE DEFENDANT: Yes.

25 THE COURT: Do you understand that if you call an

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1 attorney to testify about advice that they gave you, this is  
2 one of those instances that would result in a waiver of at  
3 least some aspects of your attorney-client privilege?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you understand that if you call an  
6 attorney to testify about communications between you and the  
7 attorney, you would be waiving your attorney-client privilege  
8 as to any communication or information concerning the same  
9 subject matter and not just the communications that you want  
10 the attorney to testify about?

11 MR. MAHER: Your Honor, may I interject?

12 This question seems to be based on language from one  
13 case. I don't know if it is necessarily the controlling law on  
14 this issue as far as the scope of the waiver so I just want to  
15 be, again, very careful that in no way is Mr. Schulte waiving  
16 privilege here today.

17 THE COURT: Well, I believe that the question doesn't  
18 elicit that answer or that concern. What I am saying is, in  
19 this question, I am trying to find out from Mr. Schulte whether  
20 he appreciates the fact that if he has an attorney testify he  
21 can't just -- he can't limit the attorney to testify only about  
22 the things that Mr. Schulte suggests, he has to testify about  
23 everything.

24 (Defendant and counsel conferring)

25 THE DEFENDANT: Everything on the subject matter;

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1 that's right.

2 THE COURT: Everything on the subject matter, yes.

3 THE DEFENDANT: Right.

4 THE COURT: If you want the attorney to testify on  
5 your behalf he is subject to cross-examination. In  
6 cross-examination you would be subject to cross-examination on  
7 what else you may have discussed with Ms. Shroff.

8 (Defendant and counsel conferring)

9 MR. MAHER: Sorry to interject, your Honor. Could we  
10 have that last question one more time, please?

11 THE COURT: Okay.

12 If you call an attorney, Mr. Schulte, to testify about  
13 communications between you and the attorney, you would be  
14 waiving your attorney-client privilege as to any communication  
15 or information concerning the same subject matter, and not just  
16 the communication that you want the attorney to testify about.

17 (Defendant and counsel conferring)

18 THE DEFENDANT: Yes.

19 THE COURT: Do you understand that it will be up to  
20 the Court to determine what communications or information may  
21 be disclosed because of your waiver of the attorney-client  
22 privilege?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you understand that if you decide today  
25 that you wish to call an attorney to testify, I will find that

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1 you have waived the attorney-client privilege with the attorney  
2 and will require you and your lawyers disclose communications  
3 and information concerning the same subject matter of the  
4 testimony before trial in this case?

5 MR. MAHER: Your Honor, I am objecting to this  
6 question and I believe we are putting the cart before the  
7 horse.

8 In my letter I asked the Court to have a bifurcated  
9 process, one determining disqualification; two, that after that  
10 disqualification issue is decided, to leave the actual decision  
11 of whether Mr. Schulte is going to call an attorney or former  
12 attorney as a witness to trial, or at least much closer to  
13 trial. Right now I'm not aware of any cases that give the  
14 government the ability right now to pierce privilege to have  
15 this information either in the letters that the Federal  
16 Defenders have provided *ex parte*, or for Mr. Schulte right now  
17 to say that he is waiving privilege today, at minimum now, six  
18 to seven weeks before a scheduled trial date. There is nothing  
19 in the federal rules that require that or that permit that,  
20 particularly when you look at his constitutional rights and the  
21 ethical rights that he has to confidentiality.

22 So, I am asking your Honor to please defer that  
23 question for now.

24 THE COURT: This matter first came up when the trial  
25 was scheduled for January 13th and it is an issue that affects

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1 a lot of issues and it affects the conduct of the trial, the  
2 pretrial activities. So, I am not going to -- I am going to  
3 overrule your objection, Mr. Maher, and pose the question  
4 again.

5 If you wish to call an attorney to testify who will  
6 find that you have waived the attorney-client privilege with  
7 that attorney, it will require you and your lawyers to disclose  
8 communications and information concerning the subject matter of  
9 the testimony before trial in this case.

10 (Defendant and counsel conferring)

11 THE DEFENDANT: Judge I am not prepared to waive any  
12 privilege today and I retain the Sixth Amendment right to that  
13 privilege.

14 THE COURT: Mr. Schulte, are you going to make a  
15 choice to have Ms. Shroff and Mr. Larsen testify on your  
16 behalf?

17 (Defendant and counsel conferring)

18 THE DEFENDANT: I reserve the right to call them both  
19 but I have not made any decision yet. It is up to the trial  
20 team to make that determination.

21 THE COURT: When are you prepared to make that  
22 decision?

23 (Defendant and counsel conferring)

24 MR. MAHER: Your Honor, I am objecting to this  
25 question along the lines that I raised in my December 13th

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1 letter that I believe for Mr. Schulte -- let me take a half  
2 step back.

3 I believe we are in a situation right now where  
4 Mr. Schulte is being placed in the position where he has to  
5 choose between potentially exculpatory evidence or retaining  
6 counsel. That is exactly the choice that he is not supposed to  
7 have to make at this point. I believe that the decision to  
8 actually decide to call an attorney or former attorney at trial  
9 has to be done with conflict-free counsel who are fully up to  
10 speed at or close to the time of trial when the trial landscape  
11 is much more available than it is now. There is no way any  
12 human being right now could say, sitting in Mr. Schulte's  
13 position as a defendant or as his attorney, to say I know for  
14 sure I'm calling an attorney at this point. We have not seen  
15 the government's case at trial yet. And, my concern also is  
16 that, again, you are asking Mr. Schulte to effectively waive  
17 privilege weeks before trial when there is no authority for  
18 that.

19 THE COURT: I do that against the background of the  
20 August 26 and October 10 letters in which lawyers for  
21 Mr. Schulte asked for a Curcio hearing. The subject matter of  
22 the Curcio hearing was whether or not conflict-free counsel --  
23 which happens to be you, Mr. Maher -- could so advise him.

24 MR. MAHER: Right. And there is a big difference, I  
25 submit, your Honor, which I explained in my letter, between

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1 Curcio counsel assisting Mr. Schulte and understanding the  
2 potential benefits and detriments right now of that testimony  
3 versus making the actual decision at trial to call those  
4 attorneys and to potentially have to give over discovery, none  
5 of which is the point which we have agreed to at this point,  
6 your Honor.

7 THE COURT: What have you been doing with production  
8 of documents?

9 MR. MAHER: That is different. There is no  
10 obligation -- my understanding, under the federal rules or  
11 federal statutes, that the defense has to provide anything  
12 related to this subject matter to the government at this stage.  
13 There is zero rule.

14 THE COURT: At what stage does Mr. Schulte have to  
15 make disclosure?

16 MR. MAHER: The general rule, depending on whether the  
17 defense opted into Rule 16 or not, would be to turn over any  
18 written statements that are the subject matter of the testimony  
19 after the witness has testified. But, that has been changed  
20 and that can be different depending on order of the Court.

21 THE COURT: Right.

22 MR. MAHER: But I'm not aware of any time --

23 THE COURT: The government has already produced  
24 information.

25 MR. MAHER: That's different. That's different than



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1 defense having to disclose, particularly, attorney-client  
2 privilege information weeks before trial. Totally different  
3 scenarios, your Honor.

4 THE COURT: And what would happen in the circumstances  
5 that Mr. Schulte does this, makes his announcement a week  
6 before trial and then we find out that the testifying lawyer  
7 cannot appear as an advocate and we adjourn the case? Is that  
8 what we do?

9 MR. MAHER: No. Absolutely not. That's what I am  
10 saying, your Honor.

11 Right now your Honor has enough, more than sufficient  
12 evidence and facts and information before it to find that there  
13 is a conflict that is a conflict that rises to the level of  
14 disqualification for these attorneys and that Mr. Schulte needs  
15 new counsel appointed so that way there isn't some surprise a  
16 week before trial or in the middle of trial that, oh, now I  
17 want to call Ms. Shroff at trial, now I want to call  
18 Mr. Larsen, or anybody else. That doesn't happen if your Honor  
19 takes the step now and issues the disqualification order.

20 THE COURT: And if I don't want to issue the  
21 disqualification order because there is no real conflict, both  
22 Mr. Larsen and Mr. Schulte can testify about their conversation  
23 and the counsel who is litigating the case doesn't have to  
24 testify.

25 That would meet the requirements of the professional

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1 regulations.

2 (Defendant and counsel conferring)

3 MR. MAHER: I actually don't think that that's a  
4 proper way for that to play out, your Honor.

5 THE COURT: Why is it improper?

6 MR. ZAS: Your Honor, if may?

7 MR. LAROCHE: Yes.

8 MR. ZAS: The choice at trial of who to call as a  
9 defense witness belongs to trial counsel in consultation with  
10 Mr. Schulte. With respect, if you keep Ms. Shroff on as  
11 counsel, in effect you are deciding that she can't testify and  
12 you would force Mr. Schulte either to choose Mr. Larsen or  
13 nobody. We don't think that's the proper role of the Court.  
14 Only trial counsel -- trial counsel -- is going to have to look  
15 at all the subtleties of the trial, how strong is the  
16 government's case, how strong is the defense, which witness if  
17 any should we call, maybe both of them should be called. It is  
18 not appropriate for the Court to make that decision now just  
19 for the sake of keeping the trial on schedule. We think his  
20 Sixth Amendment right to call witnesses in his defense is so  
21 fundamental that that can only be made by a trial lawyer with  
22 full information who is not subject to the conflict themselves.

23 THE COURT: So you would disqualify Ms. Shroff?

24 MR. ZAS: Yes.

25 THE COURT: We would put in substitute counsel?

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1 MR. ZAS: I'm sorry?

2 THE COURT: We would put in substitute counsel?

3 MR. ZAS: Will I put in substitute counsel or will  
4 someone else? I sorry. I couldn't hear you.

5 THE COURT: We would have to appoint substitute  
6 counsel.

7 MR. ZAS: Yes. That's right.

8 THE COURT: And that would take how long? Ms. Shroff  
9 has been working on this for over to years.

10 MR. ZAS: Yes; and I don't think it is all for not and  
11 I think we have made progress so a new lawyer wouldn't take the  
12 amount of time that Ms. Shroff has taken just to go through all  
13 the --

14 THE COURT: Six months to a year?

15 MR. ZAS: I would suspect that that's right.

16 THE COURT: And your client would remain in jail?

17 MR. ZAS: He does understand that, your Honor; not  
18 only in jail but in the strict SAMs conditions.

19 THE COURT: Mr. Schulte, I am going to continue with  
20 my inquiry of you just to make sure you understand what will  
21 happen in the event one of your lawyers is called to testify so  
22 that you understand some of the consequences of your decision,  
23 if and when you make that decision.

24 If you call an attorney to testify, the attorney will  
25 be subject to cross-examination by the government.

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1 Do you understand?

2 THE DEFENDANT: Yes.

3 THE COURT: If you offer evidence during your case at  
4 trial including the testimony of an attorney, the government is  
5 entitled to offer evidence in rebuttal.

6 Do you understand that?

7 THE DEFENDANT: Yes.

8 THE COURT: If you offer evidence during your case at  
9 trial including the testimony of an attorney, that may open the  
10 door to evidence from the government that would otherwise be  
11 inadmissible in this case.

12 Do you understand?

13 THE DEFENDANT: Yes.

14 THE COURT: If you offer evidence that an attorney  
15 gave you certain advice and that you believed that by following  
16 that advice you were acting lawfully, do you understand that  
17 the government would be entitled to offer other evidence of  
18 other situations in which did you not follow the advice of your  
19 attorneys including cross-examining defense witnesses?

20 (Defendant and counsel conferring)

21 THE DEFENDANT: Could you repeat that?

22 THE COURT: Yes.

23 If you offer evidence that an attorney gave you  
24 certain advice and that you believed that by following that  
25 advice you were acting lawfully, do you understand that the

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1 government would be entitled to offer evidence of other  
2 situations in which you did not follow the advice of your  
3 attorneys, including by cross-examination of defense witnesses?

4 (Defendant and counsel conferring)

5 MR. MAHER: Your Honor, I would ask your Honor if we  
6 could amend that to the "government may be able to." I don't  
7 want this to be interpreted that there is a blanket waiver,  
8 again on Mr. Schulte's behalf, of the scope of the government's  
9 cross-examination because there might be litigation that could  
10 limit what the government is seeking to elicit on cross. I  
11 think the concept has been brought already and Mr. Schulte has  
12 acknowledged to your Honor.

13 THE COURT: I will change the word "entitled" to "may  
14 be permitted."

15 MR. MAHER: Thank you.

16 THE DEFENDANT: Yes.

17 THE COURT: If you offer evidence that an attorney  
18 gave you certain advice and that you believed that by following  
19 that advice you were acting lawfully, do you understand that  
20 the government would be entitled to offer other evidence that  
21 you may have previously stated that you did not care whether  
22 your actions were lawful?

23 MR. MAHER: Again, I would ask your Honor to make the  
24 statement same amendments; the government might be able to or  
25 may be able to.

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1 THE COURT: May be allowed to offer evidence that you  
2 have previously stated that you do not care whether your  
3 actions are lawful.

4 THE DEFENDANT: Yes.

5 THE COURT: Now, I have just given you two or three  
6 examples. There are many other examples about lawyers and the  
7 testimony and cross-examination. Do you understand that it  
8 didn't give you a complete catalogue?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you understand that Ms. Shroff is  
11 ethically prohibited from representing you during the trial and  
12 also testifying at trial as a witness, whether as a witness for  
13 you or for the government.

14 Do you understand?

15 THE DEFENDANT: Yes.

16 THE COURT: If Ms. Shroff or Mr. Larsen testifies as a  
17 witness at trial, their status as witnesses will limit the role  
18 they can play in the proceeding. In other words they won't be  
19 able to appear advocates.

20 Do you understand?

21 THE DEFENDANT: Yes.

22 THE COURT: Do you believe that Ms. Shroff and  
23 Mr. Larsen's testimony would be helpful to you?

24 (Defendant and counsel conferring)

25 THE DEFENDANT: Yes, I do.

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1 THE COURT: Do you understand that if you wish to  
2 offer testimony from an attorney from the Federal Defenders of  
3 New York, that would not mean that other lawyers in the Federal  
4 Defenders of New York are disqualified from this case but only  
5 that any lawyer from the Federal Defenders that you call as a  
6 witness would not be able to stand up in court and make  
7 arguments, question witnesses, or present evidence on your  
8 behalf.

9 MR. MAHER: Your Honor, I object. This question isn't  
10 legally correct and I don't think it is necessary for the  
11 colloquy for today.

12 THE COURT: Where is it incorrect?

13 MR. MAHER: It's incorrect as laid out in the Federal  
14 Defenders' December 16th, 2019 letter, I believe on page 3,  
15 where they outlined that if there is ineffective assistance of  
16 counsel --

17 THE COURT: I'm talking about the lawyer's witness  
18 under professional conduct rules.

19 MR. MAHER: There are many subtleties to that.

20 THE COURT: Yes.

21 MR. MAHER: I would also point your Honor to the  
22 discussion we just had at side bar at the beginning of this  
23 proceeding as for reasons why, if Ms. Shroff or Mr. Larsen is  
24 going to testify, the entire Federal Defenders office would  
25 also have to be disqualified.

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1 THE COURT: That's not the law and that is not what  
2 the rules of conduct say. Indeed, what they say is the  
3 non-testifying lawyer and the testifying lawyer may continue to  
4 represent the client outside of the tribunal with the client's  
5 informed consent in pretrial activities such as legal research,  
6 fact gathering, preparation or argument of motions, and briefs  
7 on issue of the law and may be consulted during the trial with  
8 the lawyer serving as an advocate.

9 (Defendant and counsel conferring)

10 MR. MAHER: Sorry, your Honor. If we can have another  
11 30 seconds?

12 (Defendant and counsel conferring)

13 MR. MAHER: With the Court's indulgence, if your Honor  
14 can please repeat the question one more time?

15 THE COURT: Pam, will you read the question back,  
16 please?

17 MR. MAHER: Thank you.

18 (Record read)

19 MR. ZAS: Your Honor, I'm sorry. The difficulty we  
20 are having is we think in there is a lot of law, and by having  
21 Mr. Schulte answer we don't want to concede that it is a  
22 correct statement of the law. So, he understands what you are  
23 saying but because he is not a lawyer and that was not our  
24 understanding, I'm not sure that he is prepared to say that he  
25 understands it to be a correct statement of the law. But, he



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1 does understand what the question is.

2 THE COURT: All right. Does he understand that that's  
3 what I am going to rule?

4 (Defendant and counsel conferring)

5 THE DEFENDANT: I understand that if that's what your  
6 Honor is ruling that's what you are ruling.

7 THE COURT: And, Mr. Schulte, do you understand that  
8 if a new attorney is appointed, he or she will not be entitled  
9 to revisit the rulings that have already been made in this  
10 case? We are not going backwards, the new lawyer will take the  
11 case as he or she finds it.

12 (Defendant and counsel conferring)

13 THE DEFENDANT: Your Honor, I'm not a lawyer so I  
14 understand your question, but I can't make any decision whether  
15 that's true or not.

16 THE COURT: Okay. I understand. But, just so you  
17 understand, if a new lawyer is appointed, we are not going to  
18 go back and redo the Section 4 decisions or the 6(a) decisions  
19 or the suppression issues. They will take the law as they find  
20 it and has already been determined by the Court. I'm not going  
21 to allow a new attorney to relitigate positions that have  
22 already been established.

23 (Defendant and counsel conferring)

24 THE DEFENDANT: Again, I understand the question but  
25 that's something for the new trial team. If they file things

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1 it is up to the Court to make its rulings at that point.

2 THE COURT: Just so you understand, my rulings are  
3 going to be we are not going to go back and revisit issues that  
4 have already been decided because we have a new attorney.

5 Do you understand that?

6 THE DEFENDANT: If that's the Court's ruling.

7 THE COURT: I am telling you that will be my court  
8 ruling.

9 THE DEFENDANT: Okay. I understand what you are  
10 saying.

11 THE COURT: I know you are not a lawyer but I want to  
12 call to your attention that under the Rules of Evidence, I have  
13 the power to exclude evidence if its probative value is  
14 substantially outweighed by the danger of one or more of the  
15 following: Unfair prejudice, confusing the issues, misleading  
16 the jury, undue delay, wasting time, or needlessly presenting  
17 cumulative evidence.

18 THE DEFENDANT: Yes.

19 THE COURT: And, with regard to cumulative evidence, I  
20 want to tell you that if you want to call Mr. Larsen and  
21 Ms. Shroff to testify on your behalf, it will be up to the  
22 Court to determine whether the evidence they offer is  
23 admissible at trial in this case.

24 THE DEFENDANT: Yes.

25 THE COURT: Now, you consulted with Mr. Maher. Do you

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1 want additional time to consult with Mr. Maher about any of the  
2 proceedings that we are conducting now?

3 (Defendant and counsel conferring)

4 THE DEFENDANT: No. I don't need any more time.

5 THE COURT: I am willing to appoint Mr. Maher for  
6 future consultations if you wish that, Mr. Schulte.

7 THE DEFENDANT: Okay.

8 THE COURT: After considering all that I have said  
9 today, Mr. Schulte, about the ways in which calling Mr. Larsen  
10 and Ms. Shroff as witnesses could adversely affect your  
11 defense, do you believe that it is in your best interest to  
12 call Mr. Larsen or Ms. Shroff, or both, to testify about advice  
13 they provided you as attorneys in this matter?

14 (Defendant and counsel conferring)

15 THE DEFENDANT: At this time I want the ability to  
16 call both.

17 THE COURT: Do you understand that if you call both  
18 you would be waiving the attorney-client privilege as I have  
19 described it to you?

20 THE DEFENDANT: Yes.

21 THE COURT: Are you knowingly and voluntarily waiving  
22 your attorney-client privilege as to the subject matter of the  
23 testimony of your attorneys?

24 THE DEFENDANT: No.

25 THE COURT: And you will do that when? When you make

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1 your decision?

2 (Defendant and counsel conferring)

3 MR. MAHER: Again, your Honor, the same as what I  
4 expressed earlier, that I don't believe now is the time that  
5 Mr. Schulte has to make this election and further down the road  
6 will be that time. But, we are nowhere near there yet, your  
7 Honor.

8 THE COURT: Well, I disagree with you, Mr. Maher, but  
9 I'm going to give you the opportunity to brief the topic.

10 MR. MAHER: Thank you.

11 THE COURT: Mr. Schulte, do you understand that by  
12 calling an attorney to testify, the government may be entitled  
13 to admit evidence to rebut the testimony which the government  
14 might not otherwise be entitled to offer against you?

15 THE DEFENDANT: Yes.

16 THE COURT: Finally, if there is a post-conviction  
17 argument on appeal or otherwise -- I won't ask you that  
18 question.

19 Is there anything that I have asked you or said to you  
20 that you wish to have explained further?

21 THE DEFENDANT: No.

22 THE COURT: Mr. Zas, do you have anything further?  
23 Mr. Maher?

24 MR. MAHER: I do not.

25 MR. ZAS: One minute, your Honor, please?

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1 (Defendant and counsel conferring)

2 MR. ZAS: Your Honor, just one point of law.

3 We have all sort of proceeded under the assumption  
4 that the decision of whether to waive the right to call lawyers  
5 as witnesses at trial belongs to Mr. Schulte himself and there  
6 is authority that, in fact, it may be a non-waivable conflict.  
7 I just wanted to bring that authority to your attention. I  
8 think the leading case is *MacArthur v. Bank of New York*, 524  
9 F.Supp. 1205, it is a Southern District case by the late Judge  
10 Sofaer.

11 THE COURT: He is not late.

12 MR. ZAS: He is not late? I stand corrected.

13 THE COURT: Yes. He is still with us.

14 MR. ZAS: I apologize to the living Judge Sofaer and  
15 to the Court.

16 But, I just wanted to bring that to your attention.  
17 On page 1209 of that decision it just says, in relevant part,  
18 nor may the client waive the Rule's protection -- referring to  
19 the Advocate Witness Rule -- by promising not to call the  
20 attorney as a witness. The Court then goes on to explain why  
21 that's the case.

22 But I just wanted to put that out because there is a  
23 serious question as to whether even if Mr. Schulte wanted to  
24 waive whether it is the kind of dilemma or conflict that he can  
25 waive.

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1 Other than that, I have nothing to add.

2 THE COURT: The letters of August 26 and October 10  
3 were written -- were they *ex parte* letters, Ms. Shroff?

4 MS. SHROFF: They were, your Honor. There was an  
5 *ex parte* version and the on notice version. There were two  
6 different versions because there was no waiver.

7 THE COURT: I'm going direct that the letters of  
8 August 26, 2019 and October 10, 2019, plus the letter of  
9 December 13, 2019, which refer to the legal advice given by  
10 Federal Defenders, be produced to the government.

11 MS. SHROFF: Your Honor, most respectfully I am not  
12 able to do that because Mr. Schulte hasn't waived privilege.

13 THE COURT: You can brief the point.

14 MS. SHROFF: And additionally, your Honor, it is our  
15 position that he should be informed by totally independent  
16 counsel --

17 THE COURT: He has been informed by totally  
18 independent counsel. Mr. Maher is independent.

19 MS. SHROFF: Mr. Maher, unfortunately, doesn't know  
20 the case so somebody who knows the case needs to inform  
21 Mr. Schulte, somebody totally outside of the Federal Defenders  
22 who does not owe a duty of loyalty to Mr. Larsen, to the other  
23 individuals we discussed at the side bar, or to me, or to the  
24 office itself, because having anybody from the Federal  
25 Defenders involved in this decision is, *per se*, a conflict,

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1 because they have to worry about their own lawyers, their  
2 institution, and then Mr. Schulte. So, this decision should be  
3 made by entirely separate counsel who is aware of the facts of  
4 the case and can advise him.

5 THE COURT: Okay. I am directing you, if you don't  
6 produce the materials that I ordered you to produce, I am going  
7 to allow you to brief the point. I believe that Mr. Schulte,  
8 through his letters -- your letters of August 26, October 10,  
9 and December 13, coupled with his testimony today, there has  
10 been already a waiver of the attorney-client privilege and I  
11 appointed Mr. Maher to advise Mr. Schulte.

12 I am not making any rulings today but I want to  
13 resolve this issue because I think it has to be resolved. If  
14 there is going to be new counsel appointed, new counsel has to  
15 be appointed sooner rather than later, otherwise the case will  
16 be delayed further than it ought to be.

17 And so, I am directing you to produce the information.  
18 If you don't produce the information I will take briefs on the  
19 issue of why you can't take the position, or if you can take a  
20 position what your position is. I will take briefing from the  
21 government as well. But I think that there is -- I think it is  
22 pretty clear reading between the lines what it is you have told  
23 you advised Mr. Schulte and I don't see this as a Sixth  
24 Amendment constitutional issue. But, I could be wrong on that  
25 but you will tell me if I am wrong. But, in the meantime, what

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1 is pending before the Court is a motion to disqualify counsel.  
2 I think I am going to, for the reasons I have already  
3 articulated, deny the motion to disqualify the Federal  
4 Defenders. This is the third application for similar relief  
5 and I am denying it again.

6 Is there anything else to take up today, that we  
7 should take up?

8 MR. ZAS: Your Honor, I'm sorry. Just to clarify your  
9 ruling, is it deny the motion to disqualify Federal Defenders  
10 and Ms. Shroff treated as one? Or are you reserving on  
11 Ms. Shroff?

12 THE COURT: No. I am denying the motion to disqualify  
13 Federal Defenders and Ms. Shroff.

14 MR. ZAS: Thank you.

15 MR. MAHER: The briefing schedule, does your Honor  
16 have a date?

17 THE COURT: No. I was going to ask what your wishes  
18 were. The holidays are coming up. When can we get the  
19 briefing in?

20 Mr. Denton?

21 MR. DENTON: Your Honor, if they want to pick a date,  
22 I think the government will be in position to respond a day or  
23 two later.

24 MS. SHROFF: Your Honor, could we just have one  
25 second?



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1 THE COURT: Yes.

2 (Defendant and counsel conferring)

3 MR. ZAS: Your Honor, I'm sorry. Forgive us because  
4 either it is late in the day or I am just stubborn.

5 The briefing your Honor wants is specifically on the  
6 issue of whether there has already been a waiver of the  
7 attorney-client privilege such that it is appropriate to order  
8 us to disclose to the government the unredacted letters? Is  
9 that the issue?

10 THE COURT: I want you to produce the unredacted  
11 letters. If you are not going to produce the unredacted  
12 letters as Ms. Shroff suggests, I will accept your brief as to  
13 why you don't have to produce it. I believe that there has  
14 been a waiver already.

15 MR. ZAS: Yes. We are working on the schedule because  
16 we have our opposition to the motions *in limine* due on Monday  
17 and then we are into Christmas week so just one second, your  
18 Honor.

19 (Defendant and counsel conferring)

20 MR. ZAS: Your Honor, would January 3rd be acceptable  
21 to the Court?

22 THE COURT: Friday, January 3rd?

23 MR. ZAS: Yes, sir.

24 THE COURT: Mr. Denton.

25 MR. DENTON: We can get you something on Monday the

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1 6th, your Honor.

2 MR. ZAS: Your Honor, can I ask you one clarifying  
3 question? I know you denied the motion to disqualify us. We  
4 don't want to belabor the point with any further requests but  
5 is that a final determination or is that pending the briefing  
6 we are about to submit on this privilege waiver?

7 THE COURT: It is a final decision. I will revisit it  
8 if you convince me otherwise.

9 MR. ZAS: Thank you, sir.

10 THE COURT: Now, what about continuing with the 6(c)  
11 matter?

12 MR. DENTON: The government is available at the  
13 Court's convenience, your Honor.

14 THE COURT: What is your availability, and  
15 Mr. Schulte? Are you available tomorrow or Friday? Monday?

16 MS. SHROFF: Your Honor, tomorrow we have a SCIF day  
17 with Mr. Schulte and you wanted us to go through the documents  
18 that the government has now excised out and review all of them,  
19 so it would be better for us if we came back Monday.

20 THE COURT: Monday. What time? Monday from 10:00 to  
21 1:00.

22 MS. SHROFF: Sorry. I am in the wrong year -- sure.

23 THE COURT: Monday the 23rd from 10:00 a.m. to 1:00  
24 p.m. I was confusing the 20th with the 23rd. We can meet on  
25 Monday from 9:30 in the morning until whenever we want to end

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1 the session. We will go until 3:00 or 4:00 on Monday.

2 MR. DENTON: I think our hope, your Honor, is that we  
3 don't have that much left.

4 THE COURT: Right.

5 MR. DENTON: Certainly the documents other than the  
6 ones that we are going to take back and keep working on. So if  
7 your Honor has the time on Friday, we would be happy to do it  
8 then but otherwise Monday is fine.

9 THE COURT: I can do it on Friday. I am limited; from  
10 10:00 in the morning to 1:00 in the afternoon.

11 MR. DENTON: I think that would probably be fine, your  
12 Honor.

13 THE COURT: Ms. Shroff?

14 MS. SHROFF: Your Honor, do you think I could let you  
15 know by 1:00 tomorrow? Because I want to see how much I get  
16 through with him in the SCIF.

17 THE COURT: Yes, you can let me know, but I think  
18 there is a lot of work that we can get done and there is a  
19 number of issues that have been reserved on where Mr. Laroche  
20 set he would meet and review his position.

21 MS. SHROFF: I understand. I will try and work  
22 through the issues they raised with their exhibit list today  
23 and hopefully Mr. Laroche will get back to us about Government  
24 Exhibit 1 which seems to still be pending.

25 So, if we can resolve any portions of that and get

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1 some work done in the SCIF then Friday would be fine. I don't  
2 want to belabor this.

3 THE COURT: Well, let's start Friday from 10:00 to  
4 1:00 and we have all day Monday as well, the 23rd.

5 MS. SHROFF: Okay.

6 THE COURT: Is that it for today?

7 MR. MAHER: One last thing, your Honor, on my behalf.

8 THE COURT: Yes.

9 MR. MAHER: As your Honor brought up earlier,  
10 Mr. Schulte has indicated he would like the ability to consult  
11 with me I think continually or longer on this issue. Is that  
12 permissible, from the Court's perspective?

13 THE COURT: Yes. Not only is it permissible, it is  
14 desirable. So, if you want to submit a letter extending your  
15 appointment under the CJA, I would be happy to so order it.

16 MR. MAHER: Thank you.

17 THE COURT: If there is nothing else, I will see you  
18 on Friday.

19 MR. DENTON: Thank you, your Honor.

20 MR. LAROCHE: Thank you, your Honor.

21 o0o